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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL J. FRANKSTON, Plaintiff, Respondent and Cross-Appellant, v. PATRICK GLEN, et al., Defendants, Appellants and Cross-Respondents.	B145777 (Los Angeles County Super. Ct. No. BC107852)

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Alexander Williams, Judge. Judgment on the appeal is reversed and remanded; the cross-appeal is dismissed.

Greines, Martin, Stein & Richlin, Irving H. Greines and Marc J. Poster for Defendants, Appellants and Cross-Respondents.

Gambrell & Stolz and Joshua Tropper for Plaintiff, Respondent and Cross-Appellant.

Patrick K. Glenn, Neal Kaufman, Cipora Kurtzman, Harry Kurtzman and Arthur Schwartz ("Appellants") appeal: (1) the judgment upon the jury's verdict in favor of Michael Frankston on his conversion, fraud and breach of fiduciary duty claims; (2) the court's order granting Frankston's motion for summary adjudication on Frankston's partnership accounting claim; and (3) the post-judgment order awarding Frankston attorney's fees. Appellants argue, among other things, they were entitled to judgment because Frankston's causes of action are all barred by the three or four year statute of limitations governing his claims. Although Frankston filed his complaint in June of 1994, Appellants assert Frankston was on inquiry notice of his conversion, fraud and fiduciary duty claims no later than the spring of 1989. With respect to the accounting claim, Appellants contend Frankston's partnership with Appellants dissolved in the spring of 1989 and thus the accounting claim is also untimely. For the reasons discussed herein, we agree and therefore, reverse and remand.

On the cross-appeal, Frankston challenges the post-judgment award of costs. He claims the trial court erred in failing to award the costs of the accounting (including the legal and accounting fees) as a proper part of the winding up of the partnership. In view of the reversal on the appeal, the cross-appeal is dismissed as moot.

FACTUAL AND PROCEDURAL HISTORY[1]

Background of the Partnership. Frankston, a stock market investor and engineer met the Appellants in the early 1980s. Appellant Harry Kurtzman sold Frankston and the other Appellants approximately 100,000 shares each of restricted stock in a small, privately held defense industry firm, Innovative Information Systems (IIS),

[1] Although the appeal and cross-appeal raise multiple issues and involve a complex factual history, only those facts directly relevant to the dispositive issue are described in detail.

which Kurtzman controlled. Appellants and Frankston each spent approximately $6,000 for their shares of IIS stock.

In early 1987, Kurtzman told Frankston and the other Appellants about Anchor Growth (Anchor), a shell company that had no actual business, but had completed the required legal formalities to allow for public trading of its stock. Kurtzman planned a merger of IIS's parent company and Anchor. Prior to the merger, Anchor had approximately 800,000 "freely-traded" shares. Kurtzman proposed he, the other Appellants and Frankston obtain as much of the free-trading Anchor shares as possible so the people associated with IIS could control the new post-merger company and would gain a greater profit from any post-merger increase in the stock value.

Consequently, Appellants and Frankston formed a partnership to invest in the stock of Anchor. The purpose of the partnership was to buy the pre-merger Anchor stock, to resale it after the merger when its value increased and to lend the profits from the resale of the stock to the newly formed company (which they would control), with the understanding the new company would repay the partnership when the new company had the means to do so. The Anchor stock, however, could not be purchased in one lump sum. Therefore the individual partners bought small amounts of stock at different times and for different prices. Nonetheless, the partners agreed to divide equally the profits resulting from the partnership. Harry Kurtzman agreed to keep track of the partnership transactions.

Frankston purchased 45,000 freely traded shares of Anchor stock for $19,066 while Appellants purchased over 655,000 shares (collectively "partnership stock"). Thereafter in 1987, the merger was completed and the new company, Aura Systems, Inc. ("Aura") was formed. All of the pre-merger IIS and Anchor stock became Aura stock. The Appellants and Frankston assumed leadership positions in Aura. In addition to being an individual stockholder of Aura, Frankston served on Aura's board of directors.

As predicted the value of the partnership stock increased. Pursuant to their agreement in early 1988, Frankston and Appellants began selling their partnership stock and lending 65 to 75 percent of the profits to Aura. Frankston sold 30,000 shares (of the

45,000 he bought for the partnership) in April 1988 and lent Aura $25,000 of the proceeds. The Appellants collectively sold approximately 551,500 shares and lent a total of $471,583 to Aura.

Aura Stock and Cash Distribution Promised to Frankston As His Share of the Partnership Profits.

In the summer of 1988, Frankston learned Aura planned a $5 million private placement of four million new shares of Aura stock to a group of investors to raise money for the company. Kurtzman informed Frankston Aura would repay approximately $300,000 worth of partnership loans through the issuance of 240,000 shares of new restricted Aura stock in connection with the private placement, and thus, each partner would receive 40,000 shares of stock from this transaction (known hereafter as the "Partnership Debt Shares"). Frankston understood the issuance of the new stock would occur as a part of the private placement. Reducing Aura's debt in this manner allowed the company to retain funds and help attract outside investors. It was also anticipated the private placement would generate sufficient funds to place Aura on solid financial footing and allow it to repay its debts. According to Frankston, the remaining monies owed the partnership by Aura were not necessarily connected to the private placement. He understood that additional (other than the Partnership Debt Shares) partnership distributions would be paid when Aura had the funds to repay the remaining loans.

In the fall of 1988, Frankston became dissatisfied with the Appellants and the manner in which they were running Aura. He was not informed of several Aura board meetings. Frankston concluded he could not rely upon or trust the Appellants, in particular, Harry Kurtzman, when it came to the matters of business. Frankston felt Kurtzman was more interested in inflating Aura's stock price than in developing the business and building new products. In an October 1988 letter to an Aura employee, Frankston described his partners as dishonest, unreliable, incompetent, disingenuous and greedy. He indicated any further effort to assist Aura would amount to a waste of time.

Frankston and Kurtzman also had several heated personal exchanges about the business; at one point Kurtzman told Frankston to leave the premises.

At the end of October 1988, Frankston a resident of Massachusetts, made his last visit to Aura's Los Angeles headquarters. During his visit he packed up his office and met with Kurtzman and several other Appellants to come up with correct figures for how much Aura owed Frankston (on personal loans he made to the company), how much Frankston was owed by the partnership and how much Kurtzman and Frankston owed each other from other personal dealings. To that end, on November 1, Kurtzman showed Frankston a handwritten document ("Exhibit 8" at trial) purporting to account for and summarize the various non-partnership and partnership transactions. Exhibit 8 showed, among other details, the amount of Anchor stock purchased by each partner on behalf of the partnership, sold and then lent to Aura. According to Exhibit 8, approximately 19,000 shares of partnership stock remained unsold as of November 1, 1988. Of that stock, Frankston held 15,000[2] shares and the other 4,000 was held by appellant Schwartz. Exhibit 8 also showed the partners were to receive Partnership Debt Shares (i.e., the $300,000 worth of stock issued in the private placement and divided equally among the partners) and were also to receive a cash distribution of approximately $27,000 each. At the meeting, Frankston also received a check for approximately $28,990 as partial repayment for other loans he made to Aura.[3]

In December 1988, Frankston continued to sell the remaining 15,000 shares of partnership stock. At no time did Frankston offer to loan the proceeds from the sale to Aura, nor did he seek to divide the proceeds with Appellants. According to Frankston he

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[2] By the November 1, 1988, meeting, Frankston had already begun selling off the 15,000 shares of partnership stock.

[3] According to Frankston, Aura owed him personally (as separate from the partnership) more than $78,000. Aura was to repay him through a combination of the $28,000 check and a promise of $50,000 worth of new Aura shares (approximately 40,000 shares) ("Personal Debt Shares").

retained the monies from the sale while he waited for a final accounting; he intended to keep the monies as an offset against the amounts owed him by the partnership.

Also in December, Frankston had a telephone conversation with an Aura company lawyer in which they discussed the private placement and the Partnership Debt Shares. Frankston was informed the private placement would be done "soon." At that point Frankston was already expecting to receive his portion of the Partnership Debt Shares and thus, Frankston disclosed his ownership of the shares on his SEC schedule 13-D filing. In January 1989, Frankston resigned from Aura's board and "washed his hands" of the business side of the company.

The Private Placement

In late 1989, Aura began issuing news releases to announce the completion of the private placement. After the private placement, Aura became listed for trading on NASDAQ. In February 1989, Aura sent to shareholders various documents filed with the SEC including the company's 10Q; Aura's 10K was sent thereafter by mid-1989. Those documents informed shareholders Aura had completed the private placement, had paid off outstanding debts, including loans from officers and directors of the corporation and had $2,034,003 of capital to conduct business. Frankston stated he did not read Aura's annual or quarterly statement because he was not interested in them and assumed they did not contain accurate information.

Also in early 1989, Frankston began selling his non-partnership restricted Aura stock. To do so, he had to file a Rule 144 form with the SEC to have the stock restrictions lifted. These forms indicated Frankston had relied on Aura's SEC filings in applying to have the restrictions removed.[4]

[4] At trial Frankston explained that not withstanding the statements on the Rule 144 form, he did not actually review or rely on Aura's SEC's filings because he expected his stockbroker to have reviewed the materials.

In March 1989, Frankston sent Aura and several Appellants four letters in which he requested money and stock owed him by Aura and various Appellants. According to Frankston, these letters concerned non-partnership matters (i.e., did not concern the Partnership Debt Shares or any cash distribution) and instead one pertained to personal loans made to Aura by Frankston while others concerned stock of another company. Frankston received no response to his letters.

Aura's SEC S-1 form filed in April of 1989 indicated Appellants each received 48,000 shares of Aura restricted stock from the private placement. Though this document was publicly filed, Frankston was not among the shareholders sent the document.

Frankston never received his Partnership Debt Shares nor did he receive any cash distributions from the partnership.

Litigation

In March 1991, Frankston sued Aura, Kurtzman and others in federal district court seeking to recover damages for Aura's failure to give him the promised Personal Debt Shares. The jury in the federal case awarded Frankston $61,000 in damages.[5]

In March 1994, Frankston sued Appellant Glenn and another company based on an alleged unauthorized transfer of Aura shares which Frankston had instructed Glenn to hold.[6]

Frankston filed the instant action in late June 1994. In essence he alleged Appellants had taken his Partnership Debt Shares and had failed to pay him his cash share of the partnership distributions. He asserted causes of action for conversion, fraud, breach of fiduciary duty and requested a partnership accounting.

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[5] Appellants have always asserted the Personal Debt Shares and the Partnership Debt Shares are one in the same. Thus, Appellants have argued the principles of res judicata apply and preclude Frankston from recovering damages in this action for the injury for which he received a damage award in the federal action.

[6] This action was not yet final at the time the instant case came to trial.

Appellants filed a motion for summary judgment, arguing among various contentions that Frankston's conversion, fraud and breach of fiduciary duty claims (hereinafter the "Tort Actions") were barred by the relevant three and four year statutes of limitation. Appellants argued Frankston was on inquiry notice of all of his claims by mid-1989. They also argued the accounting claim was untimely because partnership dissolved no later than 1989.

Frankston claimed he did not discover Appellants' misconduct until September of 1992 (within the statute of limitations period) when Frankston reviewed internal Aura documents which he received in connection with the other litigation.[7] Frankston also filed a motion for summary adjudication on the accounting claim. The trial court denied Appellants' motion and granted Frankston's motion.

Frankston's Tort Actions went to a jury trial. In a special verdict the jury concluded Appellants had converted partnership monies owed to Frankston and the Partnership Debt Shares, had committed fraud and breached their fiduciary duties to him. Specifically with respect to the statute of limitations, the jury adopted Frankston's view that he did not have constructive notice of his claims with respect to the Partnership Debt Shares until September 1992 and did not have constructive notice of his claims for partnership cash distributions until June 1993. The jury awarded Frankston compensatory and punitive damages.

Thereafter the court memorialized its decision on the accounting. Specifically the court found, Frankston did not have constructive notice that he was not going to receive a further partnership accounting (other than Exhibit 8) until September 1992 and that the partnership was not dissolved until Frankston filed the instant complaint in June 1994.

The court entered judgment for Frankston against the Appellants jointly and severally for $646,084 compensatory damages, prejudgment interest of $575,053.50 and

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[7] These documents apparently showed that in late 1988 Appellants had divided Frankston's 40,000 Partnership Debt Shares and his portion of the partnership cash distribution amongst themselves.

$88,193.55 in costs. The court also entered judgment against the individual Appellants for compensatory and punitive damages.

Appellants filed a motion for judgment notwithstanding the verdict and a new trial. In the JNOV, Appellants argued, inter alia, Frankston's claims were barred by the statute of limitations.

The court denied the motions. Thereafter the court granted Frankston's motion for attorney's fees based on Appellants' denial of certain requests for admission. The court, however, denied Frankston's request to recover the costs (including attorney and accounting fees) of the accounting.

Appellants timely appealed the judgment and the post-judgment award of fees. Frankston timely filed a cross-appeal of the post-judgment order denying him the costs of the accounting.[8]

DISCUSSION

The jury found Frankston did not have constructive notice of his Tort Actions (i.e., conversion, fraud and breach of fiduciary duty) with respect to the Partnership Debt Shares until September 1992 and did not have constructive notice of his claims for partnership cash distributions until June 1993. In granting Frankston's motion for summary adjudication and denying Appellants' summary judgment motion on the accounting claim the court concluded the partnership was not dissolved until Frankston filed the complaint in June 1994.[9] We consider these matters in turn.[10]

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[8] This court consolidated the appeals.

[9] The court memorialized this finding in its statement of decision on the accounting.

[10] On appeal, Appellants assert other contentions in addition to their statute of limitations argument. Specifically, they claim the judgment should be reversed because: (1) Frankston cannot recover for conversion of intangible stocks and fungible money; (2) Frankston did not present sufficient evidence of damages resulting from fraud or a breach of fiduciary duty; (3) the jury and the court miscalculated the value of the Aura stock at issue and in awarding prejudgment interest; (4) the court made several errors in the

A. Tort Actions

The substantial evidence standard of review governs our consideration of the jury's finding on the statutes of limitations governing the Tort Actions.

Standard of Review. In reviewing for sufficiency of the evidence, we give all reasonable inferences in favor of the prevailing party and review the record in the light most favorable to the judgment. (*Cochran* v. *Rubens* (1996) 42 Cal.App.4th 481, 486.) Nonetheless, the substantial evidence standard of review is not "merely an appellate incantation designed to conjure up an affirmance." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.) Substantial evidence is evidence of ponderable legal significance -- that is reasonable, credible and of solid value. It does not mean any evidence. A decision supported by a mere scintilla of evidence is not sufficient. Thus, focus is on the quality rather than the quantity of the evidence. (*Id.* at p. 651.) Inferences may amount to substantial evidence, but the inferences must be based on logic and reason. A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence. (*Ibid.*)

Moreover, our review requires us to consider the entire record. "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id.* at p. 652.) Reviewing the entire record allows the appellate court to discern whether the trier of fact reasonably believed some evidence while rejecting other evidence. (*Ibid.*) With these principles in mind, we turn our attention to the merits.

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accounting by requiring the Appellants to account for more Aura shares than the partnership owned; (5) Appellants were entitled to have a jury decide whether Frankston was seeking to recover for the same shares which were the subject of his federal action; and (6) insufficient evidence supported the post judgment order awarding attorney fees. Our conclusion his claims are barred by the statute of limitations entirely disposes of the appeal, and therefore, we do not reach the merits of the other issues Appellants raised.

Tort Actions Statute of Limitations. On appeal Appellants argue Frankston's Tort Actions are barred by three and four years statute of limitations governing the claims. As set forth below, we agree.

Frankston's causes of action for fraud and conversion are governed by the three-year statute of limitations in Code of Civil Procedure section 338.[11] (§ 338; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1524-1525.) Frankston's breach of fiduciary duty claim is governed by the four-year catch-all statute of limitations in section 343.

Generally a cause of action accrues when the wrongful act is done and not at the time the plaintiff discovers it. However under the delayed discovery rules, a cause of action will not accrue until the plaintiff discovers or should have discovered, through the exercise of reasonable diligence, all facts essential to the cause of action. (*Prudential Home Mortgage Company, Inc. v. Superior Court (Diaz)* (1998) 66 Cal.App.4th 1236, 1246.) In other words, the statute of limitation runs when the plaintiff suspects or should suspect something is wrong. "'Under this rule constructive and presumed notice are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation (such as public records or corporation books), the statute commences to run.'" (*Parsons v. Tickner, supra,* 31 Cal.App.4th at p. 1525.) "A plaintiff need not be aware of the *specific 'facts'* necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly and Company* (1988) 44 Cal.3d 1103, 1111; italics added.)

The delayed discovery rule is applied to actions involving fiduciary relationships. Where a fiduciary obligation exists, however, facts which would ordinarily require

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[11] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

investigation may not incite suspicion and do not give rise to the *usual* duty of inquiry; the duty to investigate *may* arise later because the plaintiff is entitled to rely upon the assumption his or her fiduciary is acting on his or her behalf. (*Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 324-325.) In any event, once the plaintiff becomes aware of facts, which would make a reasonably prudent person suspicious, the duty to investigate nonetheless arises and the plaintiff may then be charged with the knowledge of facts which would have been discovered by such an investigation. (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202.)

Finally, the delayed discovery rules are an exception to the general rule governing the accrual of claims. Consequently, the plaintiff shoulders the burden to establish facts showing he or she was not negligent in failing to make the discovery sooner and he or she had no actual or presumptive knowledge of the facts sufficient to put a reasonable person on inquiry. (*Sun 'N Sand, Inc. v. United Bank of California* (1978) 21 Cal.3d 671, 701-702.)

The evidence presented at trial demonstrated Appellants failed to give Frankston his Partnership Debt Shares and cash distribution, and in fact, divided those assets amongst themselves in the fall of 1988. Thus, here, the inquiry turns on the issue of when Frankston discovered or should have discovered Appellants' misconduct.

Frankston filed his action in June of 1994. Accordingly, at trial Frankston needed to show he was not negligent in failing to discover Appellants' conduct and had no actual or presumption knowledge prior to June of 1991 on the fraud and conversion claims and prior to June of 1990 with respect to the breach of fiduciary duty claim. Frankston testified he first learned of the misconduct in September of 1992 when he reviewed internal Aura documents he received in connection with other litigation. In reaching its verdicts the jury adopted Frankston's view he did not have notice of his claims with respect to the Partnership Debt Shares until September 1992 and did not have notice of his claims for partnership cash distributions until June 1993.

In our view the jury's conclusion cannot stand. In reaching its conclusion, the jury rejected uncontroverted evidence susceptible to only one legitimate inference showing Frankston had constructive notice of his claims not later the spring of 1989.

At trial Frankston testified he knew he would receive his Partnership Debt Shares in connection with the private placement. In late 1988, Frankston was expecting his shares because he was told that the private placement would happen soon. He even disclosed he owned them in his SEC 13D filing. The private placement occurred in late 1988. Aura's quarterly report filed with the SEC and sent to shareholders in February 1989, disclosed the private placement had occurred and Aura was solvent. Aura's annual report sent to shareholders in mid-1989 also disclosed the private placement and further noted Aura had repaid nearly all of its debts and possessed significant operating funds. Nonetheless, neither Frankston's Private Placement Shares or any partnership cash distribution were paid to him.

Frankston testified he did not read Aura's 10K and 10Q documents[12] because he was not interested in them and based on his prior experiences with Aura he expected them to be untrustworthy.

In our view a reasonably prudent Aura shareholder would have read the company's annual and quarterly reports. Frankston is charged with the knowledge of facts which would have been discovered had he read them. (See *Turner v. Lundquist* (1967) 377 F.2d 44, 47-48 [investor charged with notice of information contained in company's annual statement and financial statements for the purposes of the statute of limitation].) Moreover, the information contained in the reports about the private placement would have caused a reasonable prudent person to make additional inquiries and investigation about the Partnership Debt Shares and any other payments Aura made on the loans owed the partnership.

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[12] Neither below nor on appeal does Frankston claim he *did not* receive Aura's 10K and 10Q reports. In contrast, he did present evidence he did not receive Aura's S-1 statement filed in April 1989, which indicated Appellants each received 48,000 shares of Aura restricted stock from the private placement.

Thus, Frankston's failure to obtain actual notice of Appellants' conduct earlier than 1992 and Frankston's delay in filing suit until 1994 is attributable to Frankston's own negligence, that is, to his failure to review information in company SEC documents readily available to him. (See *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 936 ["a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information"].)

Had Frankston read these documents, he would have discovered by mid-1989 Aura was claiming the private placement had already occurred—the very event he expected would trigger the issuance of his Partnership Debt Shares. Given that Frankston was expecting but had not yet received his Partnership Debt Shares in early 1989, his discovery from the company reports that the private placement had occurred in late 1988 would have raised suspicions that something was amiss. Reasonable inquiries following such discovery would have unearthed information, such as the publicly filed Aura S-1 document in which Appellants disclosed they had each received 48,000 shares from the private placement and thus, in essence had divided Frankston's partnership shares amongst themselves.

The party seeking to invoke the delayed discovery rules must show that he or she acted with diligence in protecting his or her rights, i.e., she has not made herself willfully ignorant. Frankston simply could not make such a showing.

Finally, that Appellants owed Frankston a fiduciary obligation does not change the result. The fiduciary relationship allowed Frankston to assume Appellants were acting on his behalf *until* he had knowledge to the contrary. A review of Aura's annual and quarterly reports and the subsequent inquiries such review would generate would have apprised Frankston Appellants were not acting in his best interest.

In light of the entire record no reasonable trier of fact could have concluded otherwise. To do so would be to isolate and credit only evidence relevant to actual knowledge (in June 1992) while arbitrarily rejecting unrefuted evidence showing constructive notice (by mid-1989).

Consequently, this is that rare case where the jury's verdict is not supported by sufficient evidence. The evidence presented at trial leads to but one legitimate and reasonable conclusion, Frankston had constructive notice of his Tort Actions in the spring of 1989 and thus his June 1994 complaint is untimely. Consequently, the trial court erred in denying Appellants' motion for a judgment not withstanding the verdict on the Tort Actions.

B. Accounting Claim

Appellants filed a motion for summary judgment arguing Frankston's partnership accounting claim was barred by the statute of limitations. Frankston opposed the motion, and in fact, filed a motion for summary adjudication of the claim, asserting the cause of action for an accounting was timely because it did not accrue until Frankston filed his lawsuit in June 1994, and thereby effectively dissolved the partnership. In denying Appellants' motion and granting Frankston's motion, the trial court concluded the accounting claim was timely filed.[13]

Standard of Review. Both the granting of summary adjudication judgment motion and the denial of the summary judgment motion are governed by the *de novo* standard of review. This court independently reviews whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c); *Union Bank* v. *Superior Court.* (1995) 31 Cal.App.4th 573, 579.) This

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[13] Frankston asserts Appellants cannot raise the issue of the timeliness of the accounting claim in this court because Appellants did not appeal the order granting the summary adjudication. However, the order granting the summary adjudication motion was not immediately appealable when entered because it did not dispose of all remaining causes of action. An order granting summary adjudication is properly reviewed after the entry of a final judgment. (*Anmaco v. Bohlken* (1993) 13 Cal.App.4th 891, 897.) In addition, the fact Appellants failed to list the order in their notice of appeal does not preclude our review of the matter. A prior nonappealable order need not be specified in the notice of appeal from a subsequent appealable judgment. (See § 906; *County of Los Angeles v. City of Los* Angeles (1999) 76 Cal.App.4th 1025, 1028). Thus, we conclude this issue is properly before us.

court applies the same standards as did the trial court. Review of the trial court's determination requires reassessment of the legal significance of the documents upon which the trial court acted. (*Hulett v. Farmers Insurance Exchange* (1992) 10 Cal.App.4th 1051, 1058.)

In conducting our review, we are limited to the facts shown by the evidentiary materials (i.e., declarations and deposition testimony) submitted, as well as those facts admitted or uncontested in the pleadings, and moving and opposing papers. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962.) The evidence presented by the moving party is strictly construed and that of the opposing party is liberally construed; the facts alleged in the evidence of the opposing party and the reasonable inferences therefrom must be accepted as true. (*Savage v. Pacific Gas and Electric Co.* (1993) 21 Cal.App.4th 434, 440.)

We affirm an order granting summary adjudication where the papers and pleadings show there is no triable issue of material fact in the action, (i.e., where the evidence demonstrates the claims of the opposing party are entirely without merit on any legal theory) thereby entitling the moving party to judgment as a matter of law. (§ 437c, subd. (c); see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36.) These principles are informative of our consideration of the issues relating to the accounting claim.

Accounting Claim Statute of Limitations. The four-year catchall statute of limitations in section 343 governs a claim seeking an accounting from a partnership. (*Manok v. Fishman* (1973) 31 Cal.App.3d 208, 213; *Peebles v. R.G. Garland Corp.* (1972) 27 Cal.App.3d 163, 166.)

Under the former[14] Corporation Code section 15043, the right to an accounting accrues to a partner against his or her other partners at the date of dissolution of the

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[14] At the time this partnership was formed in 1987, California partnerships were governed by the Uniform Partnership Act (UPA). In 1996, the Legislature enacted the "Uniform Partnership Act of 1994" which was made to apply to all partnerships entered into after January 1, 1997. This partnership formed prior to that date continues to be governed by the original UPA. Consequently, all references to the Corporations Code herein refer to the former, pre-1997 code or the original UPA.

partnership absent an agreement to the contrary.[15] Former Corporations Code section 15029 defined dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from winding up of the business." Pursuant to former Corporations Code section 15031, a partnership is dissolved by various means including the termination of the particular undertaking of the partnership agreement. In other words, a partnership ends, a cause of action for a partnership accounting accrues and the statute of limitations begins to run when the business of the partnership is substantially complete or where the purpose of the partnership is accomplished. (See *Wrightson v. Dougherty* (1936) 5 Cal.2d 257, 261; *San Francisco Iron and Metal Company v. American Milling & Industrial Company* (1931) 115 Cal.App. 238, 248.) Moreover, "an abandonment or dissolution of a partnership . . . may take place by conduct inconsistent with its continuance, in spite of the fact that liquidation is not complete, or that some appearances of partnership continue." (*Middleton v. F.P. Newport* (1936) 6 Cal.2d 57, 62.)

In our view uncontroverted evidence presented below in connection with the motion for summary judgment and motion for summary adjudication leads to but one logical conclusion, that is, Frankston's partnership with Appellants dissolved no later than spring 1989 when the business of the partnership was substantially complete and its purpose accomplished.

Appellants and Frankston formed a partnership to invest in the stock of Anchor. The purpose of the partnership was to buy the pre-merger Anchor stock, to resale it after the merger when its value increased and to lend the profits from the resale of the stock to Aura with the understanding Aura would repay the partnership when Aura had the means. All of the transactions and events relating to the partnership's business occurred between 1987 and early 1989.

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[15] There is no evidence the partners made any agreement on a date to complete an accounting.

Frankston and Appellants began purchasing pre-merger Anchor freely traded stock in 1987. Also in 1987 Aura was created from the merger of Anchor and IIS's parent company. In 1988, Frankston and Appellants sold almost all of the partnership stock and lent the proceeds to Aura. In late 1988, Aura completed the private placement and began to repay partnership and other debts.

In late 1988, only 19,000 shares of partnership stock were still held by the partners. Of that, Frankston held 15,000 shares, which he sold between late 1988 and early 1989. At no time did Frankston offer to loan the proceeds from that stock sale to Aura, nor did he seek to divide the proceeds with Appellants. According to Frankston he retained the monies from the sale while he waited for a final accounting; he intended to retain the monies as an offset against the amounts owed him by the partnership. Frankston's conduct with respect to the 15,000 shares is inconsistent with the continuance of the partnership, and instead is consistent with the view the partnership had completed its undertaking and all that remained was the winding up of partnership affairs.

There was simply no evidence the partnership conducted any business (i.e., bought any additional shares or lent any funds to Aura) after early 1989. The fact the partnership still owned 4,000 partnership shares in early 1989 does not, standing alone, prolong the life of the partnership. These assets notwithstanding, by the spring of 1989 the partnership's purpose was accomplished as there was no evidence Aura needed or sought any new loans from the partnership at that point.

In view of the foregoing, we cannot agree with the lower court's finding the partnership existed until Frankston filed this lawsuit in June of 1994. Instead, we conclude the uncontroverted evidence demonstrates the partnership dissolved no later than spring of 1989 and the four-year statute of limitation for the accounting claim ran no later than the spring of 1993. Consequently, the trial court erred in granting summary adjudication on Frankston's accounting claim and erred in failing to grant Appellants' judgment on the claim.

DISPOSITION

The judgment is reversed and remanded with directions to the trial court to (1) grant Appellants' motion for judgment notwithstanding the verdict; (2) deny respondents' motion for summary adjudication on the accounting claim and grant Appellants' motion for summary adjudication on the accounting claim; and (3) to enter an order denying respondent's post-judgment motion for fees and costs. The cross-appeal is dismissed as moot. Appellants are entitled to costs on appeal.

WOODS, J.

I concur:

MUNOZ (AURELIO), J.*

*Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

JOHNSON, J., Dissenting

I concur with respect to the disposition of the tort causes of action. I respectfully if briefly dissent, however, from the reversal of the trial court's decision denying appellants' summary judgment motion in which the judge rejected their claim the statute of limitations had run on respondent's accounting action. Admittedly, one might reasonably quarrel with the judge's further decision granting respondent summary adjudication on the same issue – finding there was no triable issue but that the limitations period had *not* expired. Yet in my view that is a much closer call than the position the majority opinion accepts – this court's holding there is no triable issue but that the limitations period *had* expired. At a minimum, there is a triable issue whether the statute of limitations indeed had run. As a result, at a minimum, I would remand for a full scale trial on that question.

My differences with the majority opinion are not about the applicable law, but with its appraisal of the facts. To begin explaining why summary judgment is inappropriate, recall appellants bear the burden of proof on the statute of limitations issue. In order to earn a summary judgment, they must demonstrate conclusively the statute began running before June 29, 1990. They cannot succeed by withholding testimonial or documentary evidence which might contradict their position and then claim respondent has failed to prove the limitations period commenced later than that date. It is their burden and, especially at the summary judgment stage, a heavy one. And, on appeal of a trial court's denial of summary judgment, it is an even heavier burden. That court's evaluation of appellants' evidence and its conclusion respondent failed to prove conclusively the limitations period had expired before respondent filed his complaint is entitled to great deference.[1]

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[1] On the other hand, no such deference is owed to that same judge's decision on respondent's summary adjudication motion. Instead in considering that motion, we must ask whether, construing the evidence and inferences in appellants' favor, there remains a

The majority opinion adopts appellants' position the partnership had terminated more than four years before respondent filed his action because the partnership had a "particular undertaking" and that "undertaking" had been completed. The burden of proof once again falls heavily on respondents. "A partnership once shown to exist is presumed to continue until the contrary is shown, and the burden of proof is upon him who asserts its termination."[2]

Here, at a minimum, a triable issue remains exactly what constituted this partnership's "particular undertaking (or undertakings)" and whether the partnership had completed that "particular undertaking" or those "particular undertakings" by June 1990.

To begin with, it is important to note the partnership formed to take over the shell publicly-traded corporation and merge it with the partners' privately held but operational company was a distinct business entity not absorbed into the merged corporation. Thus, Frankston's resignation from the board of the latter had nothing to do with the continuance of the partnership.

The partnership itself contemplated several "undertakings" beyond the initial purchases of stock in the publicly-traded shell corporation, at least some of which had not been completed as of June 1990 – and probably not as of June 1994. From the beginning, those "undertakings" included not only a pooling and eventual distribution of the stock acquired, but the sale of appreciated stock to defray the "cost" of making those initial purchases. Beyond that, later events evidenced the partnership continued and added further "undertakings" including personal loans to the company as well as use of the partnership stock to support the ongoing operations of the new corporation – and especially to rescue it if and when it fell into financial jeopardy. The first time this occurred was in the Spring of 1988 when, at Kurtzman's request, partners including Frankston began selling partnership shares and loaning most of the proceeds to the

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triable issue the limitations period indeed had expired before respondent filed his accounting action. In my view, neither party submitted evidence in support of their cross-motions sufficiently conclusive to avoid a finding the issue remains "triable."

[2] See, e.g., *Asamen v. Thompson* (1942) 55 Cal.App.2d 661, 668-669.

company with the understanding they would be repaid at a later time. Still later on, the partners agreed to accept additional restricted shares as repayment of the partnership loans they had made to shore up the company.

There is a triable issue, at a minimum, whether all of these "undertakings" had been completed as of June 1992 – or have as yet. Appellants have failed to produce evidence all the partnership shares have been sold, the loans repaid, and all distributions made. On the other hand, there is substantial evidence distributions were *not* made to at least one of the partners – respondent Frankston – which itself was part of the partnership's "undertakings." Nor is there conclusive evidence the partnership did not remain on call to buttress the company if and when it ran into choppy financial waters – through personal loans, partnership loans, the issuance of new stock or whatever – well into the 1990's. In other words, it is far from clear this partnership had the limited "particular undertaking" the majority opinion describes and finds was fulfilled in the late 1980s.

For this reason, I would remand the accounting action to the trial court for a full trial of the statute of limitations issue.[3]

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JOHNSON, Acting P. J.

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[3] In my view, Frankston also should prevail on his cross-appeal were this court to have affirmed his accounting action. It would be appropriate for this court to reverse the trial court's refusal to allocate the fees and costs of the accounting action among all the partners. The trial court required Frankston to bear all those costs despite the fact the accounting was a partnership function and is considered a benefit to the entire partnership, including those partners who are accused and proven to have violated the partnership agreement. Indeed this division recently decided this very issue in the closely analogous context of a close corporation. (*Cziraki v. Thundercats, Inc*. (Aug. 20, 2003, B159413) ___ Cal.App.4th ___, 2003 Cal.App.Lexis 1286.) In that case, one of only three shareholders won a derivative action accusing the other two shareholders of actions detrimental to the corporation. We reversed the trial court's denial of the successful shareholder's motion requesting the corporation reimburse his litigation fees and costs. We ruled it was irrelevant there were no "passive" shareholders or that the two shareholders who were sued had interests adverse to the successful shareholder or that the plaintiff had also filed and lost individual claims against the other shareholders in the same lawsuit.